DEPARTMENT OF STATE

Washington, D.C. 20520

October 20, 1970

[redacted]

MEMORANDUM

TO: L - Mr. John R. Stevenson

FROM: L/PMO - Robert H. Neuman

SUBJECT: Some Observations on the Law of the Sea

The following are some thoughts and conclusions on various aspects of our law of the sea (LOS) efforts. It seemed to me that it would be useful at this point to set these observations down on paper, since, in our discussions, we rarely if ever attempt to consider these substantive and procedural elements as part of an integrated whole, involving ultimate as well as transitory goals and real as opposed to tactical USG interests.

National Interests

The interests of the United States in the development of ocean law coincide with the fundamental priorities of other aspects of our foreign policy. That is, our needs and objectives can be regarded in both a parochial and a global sense. We have certain goals and needs that arise out of the peculiar economic, geographic, technological and strategic situation of the United States, and this "bundle" of interests will coincide to a greater or lesser extent with the national interests of certain nations, while it will differ from the interests of others. In the larger sense, we have as a superpower an over-riding interest in a stable world order, which for LOS purposes means stability and certainty in the rules and procedures governing the use of the seas. While most major powers share this general interest, smaller, newer and poorer countries may not, since, their interests may be better served by disrupting established (or establishment) rules, thus creating an atmosphere of uncertainty in which their claims to a more equitable allocation of ocean resources may be more effectively realized.

In seeking to promote our wider goal of LOS stability, we should and will simultaneously pursue our specific

[redacted]

L/PMO:RHNeuman:jak

national objectives. In so doing, however, we must not delude ourselves into mistaking tactical objectives for real interests. If only for purposes of negotiation, the identification of our real interests appears to be a priority matter that has not yet been seriously undertaken. I would recommend that an effort to arrive at interagency agreement on a comprehensive statement of national interests be undertaken at an early date; once achieved, I believe a good deal of the continuing interagency bickering over tactical matters would be eliminated.

For purposes of illustration, and by no means with a pretension to completeness, the following descriptive list of national interests is suggested. Priorities among these interests are discussed infra.

USG interests in LOS

1. Strategic.

   a. Naval access to all marine areas where presence of US warships is likely to be important either in a combat situation, as a deterrent, or for intelligence gathering purposes.

   b. Ability to overfly strategic marine areas for purposes of combat, deterrence or surveillance.

   c. Ability to effect submerged transit of significant international straits with nuclear armed and nuclear powered submarine vessels.

   d. [redacted]

2. Economic

   a. Protection of domestic fishing industries (coastal and distant water).

   b. Protection of US offshore petroleum operations.

c. Protection and encouragement of offshore (deep seabed) hard mineral operations.

d. Facilitation of US merchant shipping operations.

e. Facilitation of commercial scientific marine research (really, a factor of sub-items a. through d.).

3. Technological

a. Facilitation of marine research for purely scientific purposes.

b. Facilitation of marine research for either military or scientific - military applications.

c. Development of marine techniques for more effective commercial, scientific or military utilization of the seas.

4. Environmental

a. Protection of US coasts and adjacent waters from marine pollution or degradation.

b. Protection of living marine resources beyond US coastal waters from pollution.

5. Foreign Policy

a. Utilization of marine resources for maximum economic advancement of LDC's, consistent with other USG interests.

b. Avoidance of political, military, economic or ideological conflicts arising from ocean use.

c. Promotion of international marine cooperation as a factor of world order and stability.

Discussion

These various national interests are in some ways complementary and in some ways competitive. The satisfaction of all of these interests will clearly require compromise with respect to some of them. We can neither seek nor expect to achieve all of our objectives to their maximum extent. Thus, an ordering of priorities is necessary. For this purpose, the various components of our interests out of which a national LOS policy should emerge are examined below.

Military/Strategic Objectives

There are two paramount naval interests in LOS development: mobility for our forces and detection of hostile forces.

With regard to naval mobility, the DOD position generally is predicated upon two premises; the major premise is that broad territorial seas (e.g.: 200 miles), if widely accepted as a rule of conventional international law, would severely constrict the areas of high seas within which US naval forces could operate at will. The minor premise reflects the "creeping jurisdiction" argument: that extensions of coastal state special-purpose jurisdiction beyond territorial waters will inevitably lead to wider territorial sea claims.

It might be both relevant and useful to analyze the underlying objective of maximum naval mobility (leaving aside for the time being the question of passage through international straits). Why, for example, would our naval forces be hampered in the execution of their mission by wider territorial seas? In a combat situation, the breadth of the territorial sea hardly seems to be a relevant factor. Allies will presumably permit entry of our naval forces into their territorial seas, enemies are, after all, belligerents, and [redacted]. In peacetime, our allies would presumably consent to US naval manoeuvres in their seas, while we would be unlikely to carry out naval exercises [redacted] With regard to naval movements other than manoeuvres, the regime of innocent passage continues to apply. For

the purpose of this analysis, however, the primary objective -- maximum naval mobility -- may be conceded, since the other elements of the DOD position are then brought into sharper relief.

Presumably, DOD would be less concerned over widely-accepted international agreement on a broad limit than over unilateral claims to a territorial sea wider than twelve miles. The rationale is that international agreement puts an end to wider unilateral assertions. Yet the end result of seeking widespread agreement on the breadth of the territorial sea may well be a consensus on a sea broader than twelve miles (though not necessarily 200 miles). From this standpoint, it would seem that our major objective ought to be the achievement of a widely accepted treaty provision setting a maximum permissible breadth for the territorial sea, and that the agreed maximum ought to be as narrow as obtainable.

If, from a strategic posture, this should be our primary goal, then DOD tactical objectives are not always consistent with it. DOD argues that the USG must enthusiastically oppose broad special-purpose jurisdictional limits, even if such limits come about as the result of multilateral agreement. Thus, for example, DOD opposes a treaty provision giving coastal states special jurisdiction for pollution purposes beyond the territorial sea. Defense also opposes special coastal state resource jurisdiction beyond territorial waters. Yet the inability of LDC's to acquire rights such as these through an international treaty may be a stimulus to the assertion of ever-wider unilateral claims -- and in the end, LDC frustration will create pressure for a wider territorial sea at an eventual LOS conference.

With regard to transit through international straits, DOD insists that unrestricted free passage for warships as well as merchant vessels be guaranteed as the price for USG agreement to a territorial sea wider than three miles. This is patently unrealistic, and it may even be unnecessary. The Defense position rests on the proposition that a 12-mile territorial sea will "close" approximately 116 international straits wider than six miles but narrower than twenty-four miles. Under a 12-mile regime, these straits would be entirely overlapped by territorial waters, whereas at

[redacted]

present the USG can argue that there is a corridor of high seas running through such straits.

Looking at the list of 116 straits, it is apparent (and DOD will reluctantly admit) that only [redacted] have significant strategic value -- [redacted] The remainder are minor straits which are non-essential in terms of the mobility of U.S. naval forces. With regard to [redacted]

Thus, in the absence of agreement on a territorial sea wider than three miles, and in the face of 12 mile (or wider) claims, the U.S. is forced either to assert its high-seas rights as against coastal states protesting submerged transit in important straits, or to acquiesce in the asserted jurisdiction of the coastal states. The first option obviously contains the seeds of serious problems, and presumably the USG would very carefully weigh the consequences of pursuing it. [redacted]

Clearly, there will have to be some give in Article 2. Coastal states will demand the right to exercise pollution, customs, security, health and other aspects special purpose jurisdiction in the territorial waters of straits. Rather than wait until an LOS conference to "fall back" to these positions, we should affirmatively express our understanding

[redacted]

of and readiness to satisfy these legitimate coastal state demands. Our rigidity on Article 2, rather than giving us bargaining leverage, serves only to rigidify coastal state positions. We have seen even our NATO partners remain firmly opposed to Article 2 in its present form.

Whether we will have to fall back on submerged transit remains to be seen. It is clear that very few of our allies, and even fewer LDC's, favor unrestricted submerged transit as an absolute right. It would appear, however, that we [redacted]

What may, in the end, result from all of this is a definition of "innocent passage". Indeed, the vague standard of "passage not prejudicial to the peace, good order or security" of the coastal state seems ripe for redefinition, especially after the Tiran dispute preceding the 1967 Middle East hostilities. The idea of defining innocent passage is not a startling one, and there is a good deal of agreement on the need for such definition. In the process of such an exercise, we may well be able to accomplish a greater portion of our strategic objectives than by pressing our demand for a presently non-existent right -- unlimited free passage through the territorial waters of international straits.

There are certain other concessions we may have to make regarding straits. There seems to be both a need and a justification for making some provision for [redacted] In such areas, the regime of transit need not apply to all straits, but rather only to some of them. Moreover, we may have to accept a distinction between straits traditionally used for international navigation and straits not traditionally or historically so used. Finally, we may have to accept some special regime, perhaps in the form of regional agreements, for straits leading to closed seas [redacted]

While considering the basis of our defense interests in LOS, attention should also be directed to future technological developments that might substantially alter our naval strategy. For example, the development of long-range submarine launched ballistic missiles (like the ULMS system), supplanting Polaris/Poseidon, could radically alter our LOS

[redacted]

requirements within 5-10 years. This new breed of SLBM is based on a [redacted] The implications for our territorial sea and straits positions are obvious.

With regard to detection, DOD's position rests primarily on the strategic components and requirements of the SOSUS system. Because of the restricted nature of SOSUS data, this analysis will not discuss the mechanics of the system (though I believe all members of the LOS Executive Group should receive an in-depth briefing on SOSUS, since it is the lynch-pin of DOD's case). However, several interests and considerations may be identified without regard to restricted data.

[redacted] To date, all such systems in operation are connected in this fashion. (Whether it is possible to operate [redacted] should be determined from DOD). Thus, the requirement of [redacted]

Other questions should be asked about submerged stationary detection systems: What are the alternatives to them, especially in terms of technological advances (e.g.: [redacted] What are the possibilities for development of [redacted] How effective will they be in the face of advanced evasion technology?

These issues are raised because they are rarely addressed. In the bureaucratic process, DOD tends to advance its interests as dogma, challenging the priorities of other agencies while defending the unchallengeability of its own. Those within DOD who cater to the doctrinal strategic positions of that Department without questioning them carefully do a

disservice to the agency, for our real defense interests may in fact be more readily achieved by tactical flexibility rather than the rigid advocacy of either unobtainable or non-essential goals.

Commercial Interests

Living Resources

The United States has both coastal and distant-water interests which, both as an economic and as a political matter, call for protection. Draft Article 3 is a sensible and practical attempt to balance what are essential competitive goals. It seeks to 1) preserve coastal fisheries "of substantial importance to the economy of the coastal state or a region thereof"; 2) preserve "the percentage of the allowable catch traditionally taken by fishermen of other (distant-water) states"; and 3) accomplish these goals within the exigencies of sound conservation principles. The only trouble with Article 3 is that it may not satisfy the principal distant-water states (notably Japan).

The coastal states will demand, among other things, the following:

a. Protection of high seas fisheries off their coasts against distant-water incursions even in those cases where the coastal state has not established a substantial coastal fishing industry. This amounts to a reservation against future use. Understandably, LDC's will be unprepared to agree to remain frozen in a de minimus posture vis-a-vis distant water fishermen. Put conversely, they will be unwilling to reserve to the distant-water states that portion of the MSY "traditionally" taken by the latter. This obstacle might conceivably be overcome by retaining the proposed reservation in favor of distant-water states so long as the coastal state fails to acquire the capacity to increase its catch in the adjacent high seas fishery. However, a sliding scale might be provided allowing for reductions in the allowable distant-water catch when the coastal industry develops and demonstrates an effective ability to increase its catch.

b. Coastal states will object to being limited, in terms of the allocation of the adjacent high-seas fishery, to fishing with small coastal vessels not capable of sustained high-seas fishing. Thus, for example, Pakistan argues that the present draft of Article 3 precludes her from developing a viable tuna fishery in the Indian Ocean.

The "free competition" argument does not persuade Pakistan, for she argues that her nutritional needs are indefinitely more demanding than those of Japan, and that Indian Ocean tuna caught by Japan is a commercial product earning foreign exchange for Japan, while the resource could be a basic source of protein for the population of Pakistan. Her case is not frivolous, though to developed-country listeners, it may seem demanding.

c. Coastal states will continue to be skeptical of catch data and other statistics supplied, or withheld, by distant-water states. The redraft of Article 3 attempts to alleviate these fears by using international and regional fisheries organizations as managerial units. Nevertheless, LDC's are likely to demand impartial, internationally provided data supplied to the relevant organizations either by developed states or by contractors or agents of the organizations themselves.

Which way should the USG go? In terms of commercial health, our distant-water industry has a more favorable prognosis than coastal fisheries. On the other hand, coastal/regional interests need both protection and stimulation if they are to survive. And of course, the domestic political impact of New England, Gulf Coast and West Coast congressional delegations is a relevant factor in policy formulation. On balance it would seem that we should, both from a domestic and a tactical standpoint, lean towards the satisfaction and protection of coastal fishing interests. Our distant-water industry, primarily tuna and shrimp, will have to compete more effectively with other distant-water fleets and with coastal fishing enterprises, while seeking to derive maximum benefit from negotiated regional arrangements. At the same time, U.S. coastal fishermen cannot expect to compete effectively against massive distant-water efforts (particularly Soviet) off U.S. coasts using 19th century techniques. The USG cannot long protect local U.S. fishing interests against the pressures of modern sustained fishing if those local interests cannot protect themselves through modernization of equipment. Perhaps interim federal subsidies might be a short-term aid, but in the long run coastal fishermen will probably be compelled to improve their techniques if they are to survive.

There is of course the implicit possibility that an LOS conference might adopt a broad exclusive fisheries zone beyond the territorial sea. This result would satisfy our coastal fishermen and presumably would be acceptable to DOD, assuming other DOD objectives were concurrently achieved. However, the "exclusive zone" solution has serious defects in terms of worldwide fishery objectives,

i.e. increasing available stocks and more efficient utilization of living resources. Overall productivity would probably decrease, since the coastal states could not engage in full exploitation of the exclusive areas, and would be unlikely, for political and other reasons, to allow access to distant water fleets except under onerous conditions. Moreover, rational management of resources would be impossible based on the authority of single coastal states, due to the highly migratory nature of high seas species. In short, any proposal for broad exclusive fishery zones would have to be conditioned upon a system of close international cooperation and participation of regional/international organizations, with apportionment and allocation of the MSY an inherent ingredient. This amounts, in effect, to an Article 3 - type solution; the insertion of the exclusive zones concept complicates, rather than simplifies, the problem.

Whatever the ultimate resolution of the fisheries question may be, it should satisfy the following criteria:

1. It should be consistent with other elements of the LOS package, both rationally and in terms of USG goals.

2. It should ensure preservation of species and enlargement of stocks.

3. It should encourage the development of LDC fishing industries and stimulate increased LDC yields.

4. It should protect U.S. coastal fisheries to the extent consistent with other goals.

5. It should not unduly penalize U.S. distant-water interests.

6. It should remove fishery matters from the area of political conflict.

Non-living Resources

As with living resources, our tactics with respect to non-living resources must take account of two commercial objectives: fulfilling the expectations of LDC's, and protecting U.S. economic interests.

The President has opted for a seabeds solution which involves international ownership and management of the deep seabed, and a "trusteeship" concept in a zone beyond the 200-meter isobath to the edge of the continental margin. That decision assumes an inclination to forego maximum U.S. commercial gain in favor of the LDC's. The decision having been made, we should follow through in a manner that will assure rational management and equitable allocation of resources. We cannot now, as DOD suggests, present our seabeds proposal as a quid pro quo for Article 2 -- i.e. no Article 2, no seabeds treaty (we have all heard the DOD representative advance this strategy many times).

Our main tactical objective regarding seabeds is to satisfy LDC expectations in a manner which will preclude the need (real or imagined) for wider coastal state unilateral assertions of jurisdiction. From this perspective, the proposed sharing must be genuine, and the benefits accruing to LDC's must be both real and substantial. Efforts by other USG agencies or particular industries to chip away at the U.S. proposal should be vigorously opposed. At the same time, we should be aware that we might ultimately have to go further than the present seabeds draft. This might, for example, require flexibility on the 200-meter boundary. If a wider area of exclusive coastal state control is what LDC's want, we should be prepared to accept it (within reason). Eventually, of course, the seabed boundary question is intimately connected with the breadth of the territorial sea, and I can see no way for the two to be resolved independently of each other.

We all recognize that it may be many years before there is international agreement on a regime for the deep seabed. Thus, the question of an interim regime is a pressing one, in the face of rapidly developing technology. Without going into detail on interim policy, the following objectives may be identified:

1. Facilitate and encourage deep seabed mining technology.

2. Avoid activities by U.S. nationals (and others) which could be construed as an attempt to deplete seabed resources without reference to international revenue sharing.

3. Protect U.S. commercial investments in seabed activities.

4. Avoid implications of exclusivity with respect to seabed activities of U.S. nationals.

5. Avoid and resist pressures to enter into formal "interim" arrangements with other "developed" states (although informal commercial arrangements -- e.g.: mining consortia --, with reservations in favor of the international community -- might be both acceptable and desirable).

6. All activities, arrangements and commitments should be consistent with USG plans for an eventual deep seabed regime.

Environmental Objections

It is quite certain that marine pollution problems cannot be cured through jurisdictional solutions. It is also natural for coastal states to think along the lines of national action, with wide sea "pollution zones" within which the coastal state is free to "protect itself". Indeed, there is a good deal of this sentiment within the United States. Yet it is also clear that marine pollution can be effectively combatted only through coordinated international action; as more data becomes available about the causes and effects of marine pollution, this proposition will become apparent to all coastal nations.

The components of marine pollution problems are inherently transnational. There is diversity of flags, ownership of vessels, ownership of cargo, crews, etc. Ocean currents and winds spread pollutants far from their source. A significant part of ocean pollution is caused by dumping or other discharges in territorial waters or estuarine systems. Thus, the problem by nature defies national solutions.

However, if we are to head off wide assertions of special-purpose pollution jurisdiction, we will have to demonstrate considerable vigor in multilateral forums. Many organizations are currently engaged in serious marine pollution projects, among them IMCO, ECE, IOC, GESAMP, WHO, NATO's CCMS, and UNESCO. In these and other bodies, the USG should take the lead in pressing for stronger measures of prevention, more effective means of clean-up, stricter standards and higher limits of liability.

In searching for effective international measures, however, we should recognize the legitimate interests and needs of coastal states. There are certain functions which coastal nations will want to and should perform beyond their own territorial waters (assuming a 12-mile sea), and we should not obstruct the exercise of such functions, especially in cases where the international community has failed to act (e.g.: ocean dumping).

The interagency task force should, at an early date, undertake to identify those functional areas where coastal states can and should act nationally to prevent or minimize marine pollution. If such areas are recognized early enough, they might be included by way of specific delegation in multilateral pollution treaties (not necessarily the new LOS treaty), thus relieving the pressure for unilateral coastal state action.

Conclusion

The problems of the world in the foreseeable future are the problems of the United States. Chief among these are the pressures of population and the degradation of the human environment. The population of the globe will double within 35 years, with concommitant effects in the areas of food supply, adequate nutrition, availability of living and non-living resources, recreation and health. The marine environment offers substantial opportunity to accommodate many of our present and future needs.

It is axiomatic that if poorer countries are deprived of significant ocean benefits by the actions of developed nations, the former will seek unilaterally to extend their marine boundaries without much regard to potential military or political conflict. Such extensions of course have an adverse effect on U.S. strategic requirements (although to an extent not yet determined). Since the poorer countries

are also those with undeveloped maritime or fishing interests, arguments based on freedom of navigation or competitive commercial freedom are largely unpersuasive.

We cannot think in terms of "trading off resources for freedom of navigation", as some have expressed it. What we are after, or should be, is a way to satisfy legitimate LDC expectations regarding ocean uses, while preserving reasonable and necessary rights of movement for merchant and naval vessels. At the same time, we should be able to continue and improve the quality and quantity of U.S. commercial exploitation of resources. I am convinced that these several objectives are not incompatible.

L/PMO:RHNeuman:jah